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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, MYRON E. PIERCE, ALFRED P. LOWELL, STUART RAND, FITZ HENRY SMITH, JR., JOHN C. KILEY, ARTHUR D. HILL, GRISWOLD TYNG, EDGAR P. BENJAMIN, ROBERT S. CHASE, MARGARET HACKETT, BERNARD J. ROTHWELL, EDWIN D. FLANDERS, MARGARET T. CLANCY, GODFREY L. CABOT, JOHN E. HANNIGAN, VICTOR VIAUX, CAROLINE EDMANDS, GRACE AGNES MURPHY, SAMUEL ELIOT,

vs.

THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States the petitioners for the allowance of their appeal in the above entitled suit hereby submit their jurisdictional statement.

I

Statutory Provision Sustaining Jurisdiction

Jurisdiction for the appeal is provided by § 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 (U.S.C. Title 28, § 344) which reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The proceeding is by appeal rather than by writ of error by reason of the provisions of the Act of January 31, 1928, c. 14 §§ 1 and 2, 45 Stat. 54, as amended by the Act of April 26, 1928, c. 440, 45 Stat. 466.

II

The State Statute, the Validity of Which Is Involved

The appeal involves the validity of c. 294 of the acts passed by the General Court of Massachusetts in the year 1946 approved May 14, 1946 and printed commencing at page 230 of the Acts and Resolves of Massachusetts, 1946. This statute reads as follows:

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"AN ACT AUTHORIZING THE CITY OF BOSTON TO LEASE SPACE FOR AN UNDERGROUND GARAGE FOR THE PARKING OF MOTOR VEHICLES UNDER BOSTON COMMON, CHARLES STREET AND THE PUBLIC GARDEN, OR ANY OF SAID PLACES, IN SAID CITY, INCLUDING A TUNNEL FROM COMMONWEALTH AVENUE AT ARLINGTON STREET CONNECTED THEREWITH AND AN UNDERGROUND PASSAGEWAY FROM SAID GARAGE TO TREMONT STREET.

Be it enacted, etc., as follows:

Section 1. It is hereby declared that the free circulation of traffic of all kinds through the streets of the city of Boston is necessary to the health, safety, and general welfare of the public, whether residing in said city or traveling to, through or from said city in the course of lawful pursuits; that in recent years the greatly increased use by the public of motor vehicles of all kinds has caused serious traffic congestion in the streets of the city of Boston; that parking of motor vehicles in the streets of the city of Boston has contributed to this congestion to such an extent as to constitute at the present time a public nuisance; that such parking prevents the free circulation of traffic in, through, and from said city, impedes the rapid and effective fighting of fires and disposition of police forces in said city, threatens irreparable loss in valuations of city property which can no longer be readily reached by vehicular traffic, and endangers the health, safety, and welfare of the general public; that this parking nuisance is not capable of being adequately abated except by construction and maintenance of a garage under Boston Common, and that the enactment of section two of this act is hereby declared to be a public necessity.

Section 2. Any general or special law to the contrary notwithstanding, the city of Boston, acting through its park department with the approval of the mayor, is hereby authorized to enter into a contract with a private corporation for the construction and operation, at the expense of the corporation and without cost to the city, of a garage for motor vehicles under Boston Common

in said city within the following boundaries; Bounded westerly by the easterly line of Charles street; northerly by the southerly line of Beacon street; easterly by the Soldiers and Sailors monument and the westerly perimeter of the Parkman bandstand; southerly by the Central Burying Ground; together with all necessary and convenient approaches above and below ground; provided, that on the Charles and Beacon Street frontages combined there shall be an average setback of not less than ninety feet, except at the points of ingress and egress and except that the lessee and contractors employed by the lessee may be permitted to cross and recross said setback during the period of construction at such other points as may be approved by the park department; and of an underground passageway from said garage with entrance and exit at or near the corner of West and Tremont streets for the convenience of persons employed in or using said garage; and to grant a lease for such purposes to such corporation for a term of not exceeding forty years, subject, however, to the following terms and conditions:

(1) The construction contract and the plans and specifications of the project in detail shall be attached to and made part of the lease.

(2) The carrying out of the construction contract shall be guaranteed by a surety bond in the full amount of the contract, executed by a surety company authorized to do business in the commonwealth having a capital and surplus of not less than five million dollars.

(3) The lessee shall pay for the use of the rented premises a rental equivalent to not less than two per cent of its gross receipts.

(4) The contract shall require completion within not more than three years from its date, and the lease may be subject to termination in case of breach of this or any other terms and conditions of the contract or the lease.

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(5) The contract shall require that the work of construction be so carried on that the gardens, lawns, trees and shrubs in the area will, after construction, remain in, or be restored to, substantially the same condition as prior to construction, except at the points of ingress and egress, and that the filling or relocation of the Public Garden pond, or any part thereof, will not be required.

(6) The lease shall not be assignable without the consent of the park department with the approval of the mayor.

(7) At the termination of the lease, the garage, passageway, and the tunnel if included in the lease, and all improvements and appurtenances connected therewith shall become the property of the city of Boston.

(8) The contract and lease may contain such further terms and conditions not inconsistent with the foregoing as the park department and the mayor may approve or require.

Said city acting as aforesaid is hereby further authorized in such contract and lease and subject to the foregoing conditions to permit the lessee to construct a two-lane traffic tunnel under said Garden, Charles street and Common from Commonwealth avenue at or near Arlington street to said garage, within boundaries substantially as follows: Beginning at a point on Commonwealth avenue at about midway between Arlington street and Berkley street and running in an easterly direction on and under Commonwealth avenue, and under Arlington street, the Public Garden and Charles street at a location on Charles street approximately midway between Beacon and Boylston streets to the proposed garage, so located as not to disturb the Washington monument or the bridge over the Public Garden pond; and subject to the further conditions that the fulfilment of any contract authorizing the construction of such tunnel shall be guaranteed by a surety bond executed by a surety company authorized to do business in the commonwealth having

a capital and surplus of not less than ten million dollars, and that the design of the tunnel and its approaches, including the means of ventilation, shall have received the approval of the department of public works and of the transit commission of said city.

Section 3. This act shall take effect upon its passage."

III

The decree of the Superior Court for Suffolk County sought to be reviewed was entered June 7, 1948 pursuant to rescript from the Supreme Judicial Court dated May 17, 1948, a petition for rehearing addressed to the Supreme Judicial Court having been denied on June 3, 1948. A copy of the opinion rendered by the Supreme Judicial Court on May 17, 1948 is annexed hereto.[1] No further opinion was rendered in connection with the application for rehearing.

The petition for appeal is presented herewith on August 6, 1948. The application is made to the Chief Justice of the Superior Court rather than to the Chief Justice of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts, for the reason that the decree sought to be reviewed, although entered pursuant to directions of the Supreme Judicial Court, is entered in the Superior Court and is the decree of that court.

Central New England Railway Company v. *Boston & Albany Railroad Company*, 279 U. S. 415, 417.

IV

Nature of the Case and the Ruling Which Gives Jurisdiction

The above entitled case is a bill in equity brought under the provisions of Massachusetts General Laws (Ter. Ed.)

[1] (Clerk's Note.—The opinion is printed as an appendix to the Statement as to Jurisdiction in *Pierce, et al.* v. *City of Boston*, No. 324, and is not reprinted in this Statement.)

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c. 214, Par. 3, Clause 11, to enforce a municipal trust and to prevent a diversion of the subject matter of the trust purportedly permitted to the defendant trustee by the provisions of St. 1946, c. 294 which is contrary to the obligation of the trustee under the terms of the trust.

The suit is one of three companion cases tried together and decided in a single opinion of the Supreme Judicial Court, a copy of which is annexed, and it is necessary to refer to the two companion cases as well as the above entitled case for a full understanding of its nature. The above entitled case is the last of the three in point of time.

The first case, referred to by the Supreme Judicial Court as the "Lowell case" was a statutory petition brought under G. L. (Ter. Ed.) c. 40, Par. 53 to restrain the alleged illegal expenditures of money by the respondent city. The theory of the petition was that the city holds Boston Common subject to trusts for the benefit of its inhabitants and the public; that it would constitute a breach of those trusts to permit the construction and operation by a private concern of an underground garage within the limits of the Common; that the city would incur obligations requiring expenditures through this action; and that since St. 1946, c. 294 purports to impair the obligation of contract inherent in the trust, those expenditures would be illegal. No appeal has been claimed in the *Lowell* case, since the Supreme Judicial Court determined that the statute did not contemplate or authorize any expenditure of funds by the city, and it is conceded that no federal question is presented with reference to this feature of the construction of the statute. The *Lowell* case stood or fell on the question of expenditure by the city.

In the second case, referred to by the Supreme Judicial Court as the "Pierce petition", it is alleged that the city since 1634 has held title to Boston Common in trust for the benefit of its inhabitants; that from time to time during the

past three centuries gifts have been made to the city for Boston Common including the residuary legacy under the will of George F. Parkman amounting to the sum of $5,000,000. Under that will the income was to be "applied to the maintenance and improvement of the Common and the Parks now existing." The will was dated 1887. The will further provided that "this bequest is made to the City of Boston in the hope and expectation that the Boston Common shall never either in whole or in part be diverted from its present use as a public park for the benefit and enjoyment of its citizens." It also provided that the city was to notify the executors of acceptance or rejection of the gift within a year, and there were gifts over "should the City of Boston not consider it expedient to accept the bequest for the above purposes." It was further alleged in the petition that the city proposes to divert the Boston Common from its established use as a park subject to said trusts.

In its answer the city admitted that it intended to act pursuant to the authority conferred by St. 1946, c. 294 and by way of counter claim asked the entry of a declaratory judgment declaring that St. 1946 c. 294 was constitutional and in effect that the city held title free of trust.

By their petition in the above entitled case, referred to by the Supreme Judicial Court as the "McCarthy petition", the petitioners seek to enforce the terms of the Parkman trust alone. In it they allege the provisions of the Parkman will quoted above, the uses to which the Common had been put from time immemorial and which were those referred to in the Parkman will, and that the city proposes to put the Common to uses which will frustrate the terms and purposes of the Parkman gift. The city in its answer admitted the acceptance of the Parkman Trust, admitted the uses to which it intended to put the Common, and justified under St. 1946, c. 294, alleging that thereby no breach of that trust would take place and that "the obligations im-

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posed upon the City by its acceptance of the Parkman gift" would not be impaired.

The issue tendered consequently was whether action by the city pursuant to St. 1946 c. 294 would constitute a breach of its obligation as a trustee by reason of the trust on which it held title to the Common. The decision of the Supreme Judicial Court was that the city held title subject to no trust, but subject only to an easement, and that the provisions of the Parkman will quoted above relative to the continuance of the then existing use of Boston Common were precatory only. The opinion concluded on this point:

> "We are of opinion that the proposed use of these areas will not constitute a breach of any mandatory and essential provision as distinguished from any directory and precatory provision contained in the Parkman trust."

It is thoroughly established that in determining whether a state statute violates the contract clause of the Federal Constitution, the question of construction of the obligation is one solely for the Supreme Court of the United States and that that Court is not in any way bound by the construction adopted by the state court.

Irving Trust Company v. *Day*, 314 U. S., 556, 561.

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."

U. S. Mortgage Co. v. *Matthews*, 293 U. S. 232, 236.

> "It is well established doctrine that where the contract clause is invoked this Court must determine for

itself the nature and effect of the alleged agreement and whether this has been impaired."

Shriver v. *Woodbine Savings Bank*, 285 U. S. 467, 475.

"Where legislation is assailed as impairing the obligation of contract, this Court, in defining the scope of the constitutional immunity, will determine for itself what the contract is for whose protection the immunity is invoked."

Hale v. *Iowa State Board of Assessment and Review*, 302 U.S. 95, 101.

A very great number of cases to the same effect are collected in a footnote in *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163 at 167.

It is elementary that the fiduciary obligation of the trustee of a public trust is within the protection of the contract clause and that a statute which purports to authorize or direct the trustee to permit what otherwise would be a breach of trust falls within the condemnation of that clause.

Cary Library v. *Bliss*, 151 Mass. 364.

The existence of the Parkman Trust, and consequently of the city's fiduciary obligation to carry out all of its terms, was admitted in the pleadings and recognized by the Supreme Judicial Court. No question of *cy pres* was suggested by anyone. There was no possible room for any difference of opinion but that the proposed use of the Common was wholly foreign to the uses referred to in Mr. Parkman's will. The sole question was whether the provisions of the will in question were mandatory or precatory. It is not in question that the city proposes to disregard them, or that it relies upon St. 1946 c. 294 as justifying that disregard. If the provisions are mandatory, as we submit, St. 1946 c. 294 in purporting to permit their disregard

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impairs the obligation of contract. If they are precatory, as the city asserts, there is no enforceable obligation to be impaired and so St. 1946 c. 294 escapes the condemnation of the contract clause. Whether they are mandatory or precatory constitutes a clear federal question upon which we are entitled as of right to the decision of the Supreme Court of the United States.

V

Fashion in Which the Federal Point Was Raised

The constitutionality of St. 1946, c. 294 was raised initially by the pleadings in all of the three companion cases. Specific mention of the contract clause was contained in the petition in the *Lowell* case. There it was alleged unequivocally that the statute was in contravention of § 10, Article I of the Constitution. In the *Pierce* case the petition alleged the ancient trust and the city's intention to violate it, and the city joined issue by its prayer for a declaration that the statute was constitutional. In the above entitled case there are flat allegations of proposed disregard of provisions of an admitted trust and the parties met squarely on the question of whether the erection of a garage pursuant to St. 1946 c. 294 would impair the obligations imposed on the city by its acceptance of the Parkman gift.

At the trial in the Superior Court before Mr. Justice Hanify counsel for the petitioners argued the federal question at length relying principally on *Cary Library* v. *Bliss*, 151 Mass. 264, *supra*, and a brief was filed in which that case was discussed. Following the arguments Mr. Justice Hanify handed down careful findings of fact in which at the end he referred to the earlier cases dealing with the Common and he concluded as follows:

In none of these cases does it appear that the Supreme Judicial Court had before it a record containing such an exhaustive history of the Common as the present record affords or a user of the character contemplated by the Statute here in issue.

Reservation and Report

Under these circumstances and *also because a constitutional question is presented* I reserve and report these cases for the consideration and determination of the Supreme Judicial Court on the pleadings, the evidence, my rulings and exceptions thereto and my findings of fact; such decrees to be entered as justice and equity may require." (Emphasis supplied.)

The point was further argued at length in the briefs of all counsel and in the brief of the *amicus curiae* before the Supreme Judicial Court. The binding effect of the *Cary Library* case again was the focal point of the argument.

It is established under Massachusetts equity practice that requests for rulings are inappropriate and have no technical standing. Consequently no requests for rulings of law were filed.

Boston v. *Dolan*, 298 Mass. 346, 349.

VI

The Questions Involved Are Substantial

Boston Common is probably the oldest public park in the United States. Through the years, by reason of its association with events in the history of this country, it has acquired a significance wholly unique among city parks, has come to signify concepts which are entirely distinct from the dirt, grass, trees, cement and mortar of which it is physically compounded, and has woven itself into the fabric of American history, and in the minds of many has taken on an almost sacrosanct quality. We contend that its

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peculiar qualities and position are assured by trusts and that the fiduciary obligation of the city under those trusts is beyond the reach of the fluctuating wisdom and folly of successive legislatures. Whether the words he chose were appropriate or fumbling, there can be no doubt that Mr. Parkman intended to protect the Common as he knew it and gave $5,000,000 for that purpose. Few questions could be more substantial to a great many people in whose daily lives Boston Common plays a part than the question of whether they truly are beneficiaries of a trust with reference to the Common or whether their enjoyment of it and their affection for it are subject to the pleasure of whatever legislature chances to be sitting on its border. This feeling, we believe, is likewise shared by many from cities and towns far removed from Boston who have visited the Common and treasure their visit as a vicarious participation in the history of their country. If, as we assert, the Common is held upon a trust, each one of those persons is entitled to look with secure confidence to the guaranty of the contract clause of the Federal Constitution to preserve the Common from invasion and the trust from spoil.

The question of the existence or the non-existence of a trust is undoubtedly substantial in the legal sense. The Massachusetts court has struggled with the problem of the public rights in the Common in a considerable number of cases of which this is the latest. Its varying pronouncements through *Steele* v. *Boston,* 128 Mass. 583; *Veale* v. *Boston,* 135 Mass. 187; *Commonwealth* v. *Davis,* 140 Mass. 485; *Lincoln* v. *Boston,* 148 Mass. 578; *Prince* v. *Crocker,* 166 Mass. 347; *Codman* v. *Crocker,* 203 Mass. 146; *Commonwealth* v. *Gilfedder,* 321 Mass. 335; and the instant case are not altogether harmonious. It is our submission that the latest pronouncement of that court is based on a serious misconstruction of the Parkman will. It is a matter of some

chagrin that it is necessary for the partisans of the Common and the beneficiaries of the Parkman Trust to appeal from a Massachusetts court even to a court of the United States for what they concede to be their rights. But in questions arising under the Constitution of the United States, and the construction of the trusts here involved does arise under that Constitution, the Supreme Judicial Court of Massachusetts is an inferior court. Hence this appeal.

The amount of money held in the trust which we assert is to be broken is certainly substantial. The principal is some $5,000,000 and over the years the income has amounted to some $7,500,000. The discussion by the Supreme Judicial Court of the effect of the words "in the hope and expectation" is, it is submitted, wholly inadequate. It fails to take adequate account of the provision in the will requiring the city to decide whether acceptance of the gift would or would not be expedient. It emphasizes "hope" to the exclusion of "expectation." It fails to give due effect to cases like *Warner* v. *Bates*, 98 Mass. 274, holding the words "in full confidence that" mandatory; and cases like *Colton* v. *Colton*, 127 U. S. 300, holding the word "request" mandatory. The opinion apparently leaves the city to enjoy the Parkman money to the exclusion of the legacies over while completely disregarding the words with which Mr. Parkman hedged his gift.

We submit that the petitioners are entitled as of right to review by the Supreme Court of the United States and that they are amply justified in considering themselves entitled in conscience to urge their contentions on that Court both on behalf of themselves and on behalf of the public as contentions of the greatest substance.

FRANK W. GRINNELL,
RICHARD WAIT,
Counsel for Appellants.

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